For a long time, governments have been attempting more and more to regulate franchising. Examples abound in Australia, France, Spain—even in the United States: in Australia, the franchise industry must cope with a 400-page disclosure law; in the U.S., legislators are doing their best to harm the growth of franchising in the belief that they protect free competition and fair trading; in Albania, franchising is a part of the Civil Code. These and many more examples lead us to the conclusion that the beginning of the end for franchising is very close. The latest example of attempts at regulation is the new European Commission's Block Exemption Regulation (BER).

The European Commission's Block Exemption Regulation No. 4087/88 for franchising expired 31st December 1999 and the Commission introduced a Block Exemption Regulation to apply not only to franchising but to all agreements that contain vertical restraints. The text of the new BER and its accompanying Guidelines is the last of a number of drafts on which the industry had the opportunity to comment. The Guidelines of the new BER no doubt will be used in the future as important tools on the interpretation of the provisions of the new BER. The new BER entered into force on 1st June 2000 ana snail exoire on 1st June 2010. However, the exemption provided for in Regulation (EEC) Nos 1983/83, 1984/83 and 4087/88 shall continue to apply until the entry into force of the new BER, namely until 1st June 2000. Article 12 of the new BER provides that the prohibitions laid down in Article 81(1) of the Treaty of Rome shall not apply during the period from 1st June 2000 to 31st December 2001 in respect of agreements already in force on 31st May 2000 which satisfy the conditions for exemption provided for in the Commission Regulations mentioned earlier. In other words, the new BER shall not apply in respect of agreements already in force on 31st May 2000 which do not satisfy the conditions for exemption provided for in the previous Commission Regulation on which the prohibition of Article 81(1) of the Treaty shal! have direct application.

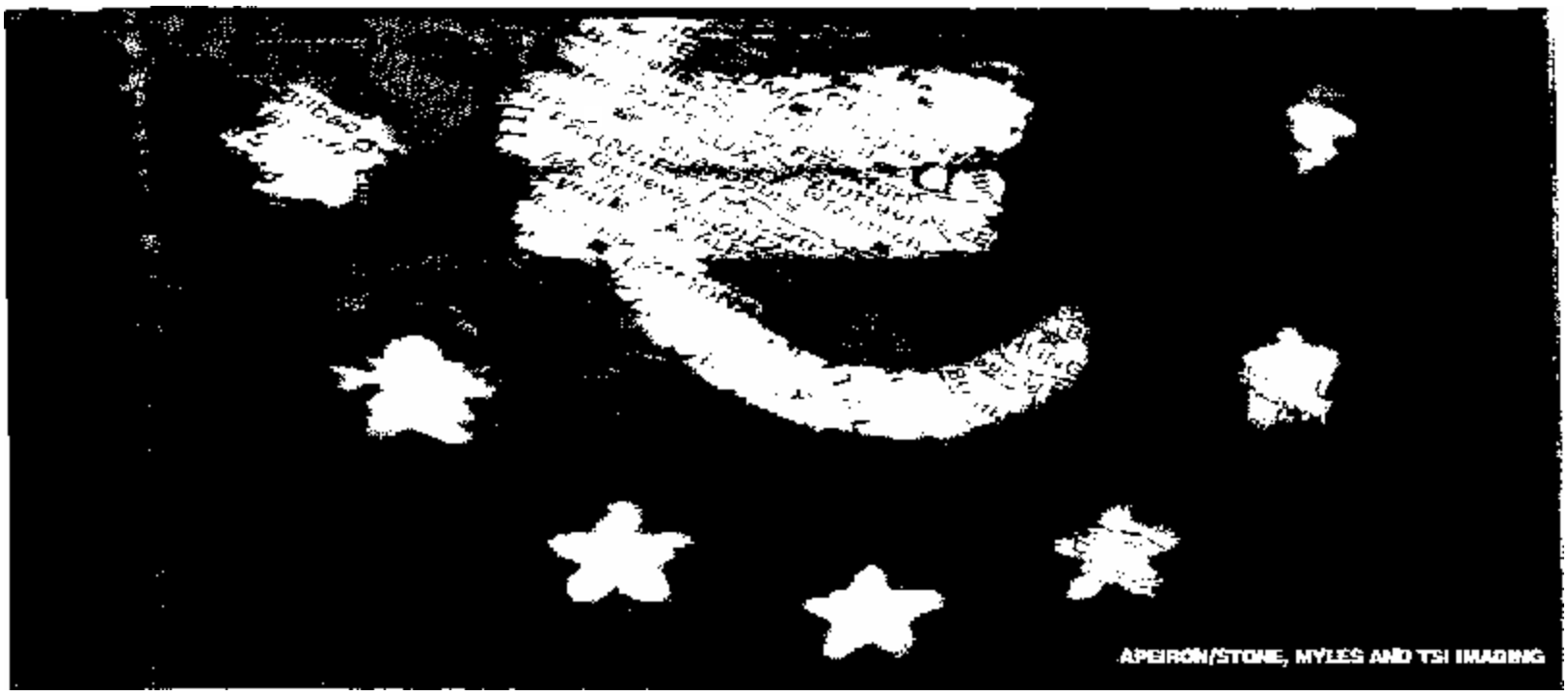
AMBIGUOUS PROVISIONS

The new BER and its accompanying Guidelines continue to reflect the Commission's lack of understanding of franchising; in fact, it counters the Commission's stated goals of simplifying and easing antitrust restrictions on verticai restraints. It is believed that the new BER and its Guidelines will create, at the very least, enormous uncertainties about the lawfulness of certain practices that are common and necessary for an effective franchise program

In the new BER a separate franchise section in the Guidelines is included. This is, indeed, a help. Nonetheless, a number of issues remain open. Hereinbelow the most important and/or ambiguous provisions of the new BER, and its accompanying Guidelines and the problems accruing from the same, shall be dealt with.

As it is stated in the Guidelines, Article 81(1) of the EC Treaty applies to vertical agreements that prevent, restrict or distort competition, the so-called "vertical restraints." For vertical restraints Article 81 provides an appropriate legal framework for a balanced assessment, recognizing the distinction between anti-competitive and pro-competitive effects. Article 81(1) covers those agreements which appreciably restrict or distort competition. Article 81(3) allows for the exemption of such agreements provided that they have sufficient efficiency benefits. For most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition, i.e. if there exists a certain degree of market power at the level of the supplier, or the buyer or both.

Article 2 of the new BER provides that the exemption of Article 1 shall apply on condition that the market share heid on the relevant market by the supplier and by undertakings connected with the supplier does not



exceed 30%. More specifically, the Guidelines mention that "in order to calculate the market share, it is necessary to determine the relevant market. For this the relevant product market and the relevant geographic market must be defined. The relevant product market comprises any products or services which are regarded by the buyer as interchangeable, by reason of their characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas,"

Still, however, numerous franchisors feel very unsure with regard to the future necessary determination and quantification of their market share. The "Commission Notice on the Definition of the Relevant Market" even gives legal experts cause to question and can hardly be understood by businessmen themselves. As the "Coca-Cola" case has shown, a company can, depending on the criteria applied for categorization, have a very high or a very low market share (drinks market, soft drinks market or cola market). Clear practical criteria should be established sooner or later.

BLACK CLAUSES

Article 3 of the new BER includes the list of the black clauses. According to the Guidelines, agreements which do not contain black listed clauses are exempted. More specifically, fixed or minimum resale prices are not allowed, while price recommendation and maximum prices are allowed. This reflects the current situation and presents no surprise.

Good news, however, is that in case of selective distribution, restrictions can be imposed on the dealer's ability' to determine the location of its business 'premises.

Further, restrictions on resales are not allowed except in cases of exclusive territories or exclusive customer groups (where third franchisees are restricted to actively re-sell), and in cases of re-sales to unauthorized distributors by the members of a selective distribution system. This suits most in-term territorial non-compete clauses that most franchises have; therefore, this clause is positive for franchising. However, by the next black clause the Commission seems to take away what it had conceded by the previous provision. More specifically, it considers a black clause the restriction of active or passive re-sales to users by members of a selected distribution system. The problem is, indeed, in the word "users" which should be replaced by the words "final consumers" to mean final private consumers. Otherwise, business-to-business franchising shall be at a risk.

As it is now, business-to-business franchising would not be able to stop active or passive sales from competitors. In discussions with the Commission the Commission clarified that by the word "users" they mean both private and commercial end users. Further, this provision opens the road to franchisees to sell to unallocated territories, i.e. territories which the franchisor has not yet allocated to anyone. An unallocated territory, whose best customers have been picked by franchisees operating freely outside their own territory, makes that territory difficult to sell to new franchisees; it also introduces "intra-brand" competition within one network, which ultimately might lead to less inter-brand competition which is contrary to what the Commission is trying to promote. In discussions

conducted the Commission admitted that the terms "active" and "passive" selling are not aimed at penalizing the franchise systems that are based on restrictions on active selling in allocated territories and in still unallocated territories. In the case of the mobile franchise ("shop-on-wheels") the Commission has clearly stated in the Guidelines that the van can only sell within allocated territory, but it can deliver beyond. Good news, however, is that in case of selective distribution, restrictions can be imposed on the dealer's ability to determine the location of its business premises. In this respect, selected dealers may be prevented from running their activity from different premises or from opening a new outlet in a different location.

SPECIFIC OBLIGATIONS

Article 4 does not exempt the following specific obligations con-' tained in vertical agreements:

(a) any direct or indirect non-compete obligation if its duration is indefinite or exceeds 5 years; however, this time limitation does not apply where the goods or services, to which a vertical agreement relates, are resold by the buyer from premises owned or leased by the supplier; provided thai the duration of such non-compete obligations does not exceed the period of occupancy of the premises of the buyer [any non compete clause is valid in contracts where the duration either exceeds 5 years or is indefinite, unless obstacles that hinder the franchisee to effectively terminate the obligation are not posed].

The new BER

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The Guidelines, further, clarify that non-compete obligations are obligations that require the buyer to purchase from the supplier more than 80% of the buyer's total purchases during the previous year of the contract goods or services and their substitutes, thereby excluding the possibility for the buyer to purchase competing goods or services or limiting such purchases to less than 20% of total purchases;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase or distribute goods or services, unless such an obligation (i) relates to the goods or services which compete with the contract goods or services, (ii) is indispensable to protect know-how transferred by the supplier to the buyer, and the duration of such obligation is limited to a period of one year after termination of the agreement; this condition is without prejudice to the possibility to impose a restriction which is unlimited in time on the use and disclosure of know-how which has not fallen into public domain;

(c) any direct or indirect obligation imposed on the members of a selective distribution system to sell or not to sell specified brands of competing suppliers. If the supplier imposes on its appointed dealers from which competing (between them) suppliers the dealers must or may not buy products for resale, such obligation falls outside the new BER.

The effects of the new BER on franchising remain to be seen, ra